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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 67, Original

STATE OF IDAHO, ex rel. CECIL D. ANDRUS,
Governor; WAYNE L. KIDWELL, Attorney
General; JOSEPH C. GREENLEY, Director,
Department of Fish and Game,

Plaintiff,

vs.

STATE OF OREGON, STATE OF WASHINGTON,

Defendants.

MOTION FOR LEAVE TO FILE
AMICUS CURIAE
AND BRIEF OF AMICUS CURIAE

Columbia River Fishermens Protective Union

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The Columbia River Fishermens Protective Union respectfully moves this Court for leave to file the accompanying brief, amicus curiae, in the above-entitled proceeding. The states of Oregon and Washington support this Motion. The Columbia River Fishermens Protective Union represents the commercial fishermen who fish the lower Columbia River. These fishermen derive their livelihood from the fish resource of the Columbia River. Many are third and fourth generation fishermen on the river. They possess strong and

obvious ecological and economic interests in the preservation of viable fish runs. These fishermen have opposed continuously and vigorously the ceaseless construction of federal hydroelectric dams on the Columbia River and its tributaries. These hydroelectric dams destroy salmon and steelhead by the millions and are responsible for any recent depletion in the Columbia River fish resource. These dams supply the state of Idaho's power, irrigation, recreation and transportation needs but they deprive commercial fishermen of their livelihood.

Three primary groups use the Columbia River fish resource: the treaty Indians whose interests are represented in this action by the United States as *amicus curiae*; the tourist and hobby fishermen whose interests are represented in this action by this Court's grant of *amici curiae* status to their representative organizations; and, the commercial fishermen whose interests are presently unrepresented in this action. As fully developed in the accompanying brief, the commercial fishermen's interests will be the most directly and drastically affected by the actions of this Court.

The accompanying brief sets forth more fully the interests and arguments of the fishermen on the issues involved herein; and, in particular, their concern with the harmful effect on the fish resource of further unwarranted judicial

intrusion into the management of this
natural resource.

DATED this day of September, 1976.

Respectfully submitted,

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AMICUS BRIEF

Commercial fishing on the Columbia River has been regulated closely since Congress approved the Oregon-Washington Columbia River Fish Compact in 1918. The Columbia River Fishermens Protective Union, or its predecessor organization, has existed and represented the interests of the Columbia River commercial fishermen including Compact regulatory proceedings for over a century. It has advocated proper management of the fish resource and resisted the relentless construction of hydroelectric dams which have invariably depleted the resource.

Because of Oregon-Washington Compact regulations the salmon and steelhead fish runs which Idaho contends are threatened are not commercially fished. Treaty Indians do fish these runs for ceremonial and subsistence purposes. Thus, Idaho should more properly have filed its grievance against the United States which represents the treaty Indian interests against the states of Oregon and Washington in other fish-related litigation c.f. Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969).

The states of Oregon and Washington do not represent the interests of commercial fishermen in this matter. The Columbia River Fishermens Protective Union is presently involved in litigation with the state of Oregon and Washington regarding their allocation of the fish resource among user groups. (c.f. The Columbia River Fishermens Protective Union v. State of Oregon, Clatsop County Circuit Court, Oregon, August 13, 1976 and Columbia River Fishermens Protective Union, Inc. vs. Donald Moos, Thurston County, Superior Court, Washington, No. 55339, August 13, 1976.)

Commercial fishermen do not overfish the runs in question; they do not fish them at all. Commercial fishing has been banned on summer chinook since 1964 and on spring chinook since 1974. Commercial fishermen in Oregon cannot take steelhead trout from the Columbia River because it is classified as a game fish and may not be sold. Commercial fishermen lose thousands of dollars each year because the Compact restricts their net sizes to prevent any incidental damage to steelhead trout while they fish other salmon

runs.

Conservation is the primary goal of the Compact regulations. For example, before the Compact members permit weekend or hobby fishing or any commercial fishing on a given fish run, escapement goals must be met. An escapement goal for a given fish run is the optimum number of spawning parents needed to provide sufficient offspring in the available pool rearing areas to produce the maximum number of healthy fish. Under normal conditions more or less escapement than the optimum number will not result in a greater production of fish. Until the fish resource is being optimally renewed there is no fishing. What better protection of the resource can be provided?

Any actual and ongoing depletion of the fish resource would not be alleviated by the state of Idaho's action before this Court. The hydroelectric dams, not inadequate regulation, are depleting the resource. These dams kill the smolts heading for the ocean by the millions and the returning pre-spawners by the thousands.

Only extraordinary efforts by the Compact members have saved and revitalized this fish resource. There are ten dams on the mainstem Columbia River and nine dams on the mainstem Snake River - a total of nineteen barriers to the fish. As the result of these dams, only fifty miles of freeflowing stream remains in the Columbia and only one hundred freeflowing miles in the Snake.

Over fifty percent (50%) of the Snake

River is no longer accessible to spawning fish. The dams have blocked and inundated spawning area after spawning area. The dams are especially destructive of the ocean-bound juveniles. During periods of low flow in the Columbia River, many ocean-bound fish are killed in the dam turbines. During periods of high flow, spillage over the dam kills many ocean-bound fish by nitrogen supersaturation. The fluctuating high and low flows of recent years have particularly affected the runs and species of salmon and steelhead trout spawned in Idaho.

Each dam kills an estimated fifteen percent (15%) of the declining balance of the pre-spawning fish returning upstream over its fish ladders. This dam loss factor requires the Compact to set incredibly high escapement goals in order to insure that sufficient numbers of fish reach the farthest upriver Idaho spawning grounds. The lower river commercial fishermen often sit on the shore as the salmon run passes knowing that most of the passing fish will be wasted because of the dams' loss factor. Thus, the Compact members actually waste much of the fish resource in their present effort to insure that particular returning salmon and steelhead runs reach Idaho in large numbers.

In spite of these facts and the long history of detailed regulation of the fish resource, the state of Idaho seeks herein:

(1) admission to the Oregon-Washington Fish Compact; and,

(2) a so-called Court-directed "equitable apportionment" of certain salmon and steelhead runs on the Columbia River between the three states.

Idaho also apparently seeks to be made more than an equal member to this Compact.

In seeing this relief, the state of Idaho asks this Court to exercise the extraordinary power of granting its original jurisdiction to hear this matter. This Court stated in Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972) that it would only grant original jurisdiction in "appropriate cases."

¶ This is not an appropriate case. The United States Constitution at Article I, Section 10 grants the power to approve Compact agreements between the states to Congress. The state of Idaho asks this Court to take the unprecedented step of forcing Congress to accept an additional member to a Compact without Congressional approval. Furthermore, Idaho requests that this Court compel Idaho's membership complete with special privileges not accorded to the other Congressionally-approved members. Idaho seeks this relief for a singular and easily discernable reason—to assert rights in migratory fish which it does not possess under this Court's ruling in Missouri v. Holland, 252 U.S. 412 (1920).

The state of Idaho refers to the subject matter of its motion as "the complex factual problem surrounding the anadromous fish problem." (Idaho Mot., p. 4). Hydroelectric dams, advocated in the past by various Idaho state agencies, have

created the situation that prompted the filing of this matter. The relief sought by Idaho will merely contribute to the complexity of the problem, not help to solve it.

Any imposition of arbitrary apportionment figures to any single state or user group would ignore the realities of effective fish management under environmental conditions which change daily. Such apportionment would spur continuous litigation by user groups. Judge Belloni, in Sohappy v. Smith, supra, is in his ninth year of presiding over continuing litigation in apportioning fish between treaty Indians and other user groups on the Columbia River. In Sohappy, supra, Judge Belloni has commented repeatedly that the fish runs can only be managed effectively by the state agencies. This subject matter contains a Pandora's box of factual disputes which can and should be handled by administrative agencies which possess local knowledge and special expertise in the subject matter.

Practically, this case is moot. Oregon has passed legislation admitting Idaho as an equal member to the Compact regarding the very runs in question. Idaho's interest in these runs coincides with that of the hobby and tourist-oriented majority of members of the Oregon Fish and Game Commission who cast Oregon's Compact vote. Washington will pass similar legislation in its next session. Its Director of Fisheries, who casts its Compact vote, is subject to intense pressure in his state from hobby and tourist fishermen. Idaho does not seek admission as an equal member, but requests special status in order to

advance hobby interests over those who fish for their livelihood.

The United States is an indispensable party to this matter. The treaty Indians are the only remaining non-Idaho fishermen who fish the runs in question. The United States represents their interests. The majority of Columbia River salmon are actually taken in the ocean in the intense fisheries offshore from Alaska, California, and British Columbia. These areas are not subject to Compact regulations. The federal Fishery Conservation and Management Act of 1976, Public Law 94-265, which takes effect on March 1, 1977 may preempt state regulation of all ocean fishing.

Idaho enjoys an alternative forum. It can apply for admission to the Compact through the United States Congress. There is no immediacy to Idaho's motion. The runs in question are not presently commercially fished. The Compact's optimum escapement policy precludes any damage to the runs beyond that caused by hydroelectric dams. Idaho will not be damaged by following the political process. Idaho supported the dams; it must live with them and the consequences they produce, and not seek special treatment to place those results onto the shoulders of other innocent parties.

In the opinion of these petitioners, Idaho seeks admission to the Compact and Court-directed apportionment with intent to shift further the balance of competing interests in the Compact to the side of the hobby and tourist fishing industry. Representatives of the hobby and tourist

fishermen regularly appear at Compact meetings to advocate the elimination of commercial fishing on the Columbia River. They seek to elevate play above enterprise.

Idaho seeks this Court to impose an extraordinary and inequitable solution to a problem which is presently being solved by appropriate ordinary and equitable means. This Court should deny Idaho's motion.

Respectfully submitted,

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